

**IN THE EMPLOYMENT APPEAL TRIBUNAL  
ON APPEAL FROM THE BRISTOL EMPLOYMENT TRIBUNAL**

**B E T W E E N:**

**MRS K HIGGS**

**Appellant**

**- and -**

**FARMOR'S SCHOOL**

**Respondent**

**-and -**

**ARCHBISHOPS' COUNCIL OF THE CHURCH OF ENGLAND**

**First Intervenor**

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**SUBMISSIONS OF THE  
FIRST INTERVENOR**

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**Introduction**

1. The Archbishops' Council of the Church of England (“AC”) is a Registered Charity set up under the National Institutions Measure 1998 to co-ordinate, promote, aid and further the work and mission of the Church of England (“CoE”). The AC provides, within the CoE, a focus for leadership and executive responsibility and a forum for strategic thinking and planning. It seeks to do this by, amongst other things, giving a clear framework to the national mission of the CoE, within an overall vision set by the House of Bishops and informed by an understanding of the CoE's opportunities, needs and resources; promoting close collaborative working between the CoE's national bodies; supporting the Archbishops with their diverse ministries and responsibilities; and engaging with government and other bodies.
2. The AC has a self-evident interest in ensuring the widest possible scope of the freedom of religion or belief in this country. However, the CoE considers it has a duty to protect the free practice of all faiths in this country. Further, as the CoE serves every community in the

country, it also has a strong interest in seeking to engender social cohesion, as is evidenced by the numerous programmes, local and national, operating under its aegis to serve the common good regardless of people's faith or non-belief.<sup>1</sup>

3. The CoE wishes to reflect the fundamental Christian principle that all persons are loved and valued equally by God. Recognising that public debate is becoming increasingly strident, and reconciliation of opposing views is harder to achieve, the CoE has sought to promulgate a framework to help its members engage in difficult discussions, including in relation to the manner in which a strongly held conviction is expressed. Based on its own experiences of debate, the CoE has formulated “Pastoral Principles”:
  - a. Acknowledging one’s own prejudice, by reflecting on attitudes and behaviours in order to be welcoming to all people, receiving differences as a gift and valuing all people;
  - b. Speaking into silence, that is welcoming and accepting others;
  - c. Addressing ignorance, by conducting discussions with respect for the CoE’s heritage and for each other;
  - d. Casting out fear so that people feel able to speak and give their views;
  - e. Admitting hypocrisy and being communities marked by attentive listening, courtesy, kindness and the absolute belief that nobody is outside the love of God;
  - f. Paying attention to power and refusing to exploit any perceived or real power over others.<sup>2</sup>
4. By extension, the CoE’s approach is to seek to create space for difference rather than to insist on conformity. People should be free to express their different views in an environment of mutual respect and tolerance.
5. The AC's intervention in this case is strictly neutral as between the parties.
6. This intervention seeks to assist the Appeal Tribunal in two ways:

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<sup>1</sup> For example, the Near Neighbours programme: <https://www.near-neighbours.org.uk/>

<sup>2</sup> Pastoral Principles: <https://www.churchofengland.org/sites/default/files/2019-05/Pastoral%20Principle%20Cards%20May%202019.pdf> (although formulated in relation to matters of sexuality, it is anticipated that the Pastoral Principles would apply to a variety of issues).

- a. To set out the law, both from a European and domestic perspective, on discrimination, freedom of religion or belief and freedom of speech.
- b. To make submissions on how the European and domestic legal requirements might be integrated in light of the policy considerations arising in this field and to propose a proportionality assessment that could be applied both to the issues in these proceedings and other similar situations involving manifestations of religion or belief.

**Requirements of the European Convention on Human Rights (“ECHR”) and Council Directive 2000/78/EC (the “Framework Directive”)**

7. It is the AC’s submission that across European law, both in relation to the ECHR and the Framework Directive, there are two essential points that can be identified from the case law:
  - a. The right to freedom of religion or belief, and the right to freedom of speech, are based on the core values of pluralism, tolerance of those rights and a willingness to have a dialogue with citizens exercising these rights.
  - b. Any limitation of those rights must be strictly proportionate to the aim pursued.

The starting point therefore is the recognition of the right to freedom of religion or belief and the freedom of speech.

***Requirements of Article 9 ECHR***

8. Article 9 of the ECHR provides:
  1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
  2. Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

9. The European Court of Human Rights has provided clear guidance on the foundational nature of the rights in Article 9, as well as the basis for limitations that may be placed on those rights:

“104. The Court reiterates that as enshrined in Art.9, freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. This freedom is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. That freedom entails, inter alia, freedom to hold or not to hold religious beliefs and to practise or not to practise a religion.

105. Article 9 does not protect every act motivated or inspired by a religion or belief.

106. In democratic societies, in which several religions co-exist within one and the same population, it may be necessary to place restrictions on freedom to manifest one's religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected. This follows both from para.2 of Art.9 and the State's positive obligation under Art.1 of the Convention to secure to everyone within its jurisdiction the rights and freedoms defined in the Convention.

107. ... Accordingly, the role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.

108. Pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of people from minorities and avoids any abuse of a dominant position. Pluralism and democracy must also be based on dialogue and a spirit of compromise necessarily entailing various concessions on the part of individuals or groups of individuals which are justified in order to maintain and promote the ideals and values of a democratic society. Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead states to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”.” *Sahin v Turkey* (2007) 44 E.H.R.R 5, emphasis added (see similarly *SAS v France* (2015) 60 E.H.R.R 11 at paras 124-128).

10. The core values of pluralism, tolerance and dialogue are essential to any understanding and interpretation of Article 9(1) and 9(2). There is a strong emphasis in the case law that the protection of Article 9 rights are essential to the proper working of a democratic society: those rights to manifest religion or belief can extend to the right to proselytise (to attempt to convince others of the tenets of that religion or belief: *Kokkinakis v Greece* 17 EHRR 397) and to evangelisation (to bear witness in words and deeds: *Eweida v United Kingdom* 57 EHRR 8). Before restrictions to the rights to freedom of religion or belief are weighed, the essential nature of the rights must be recognised.

11. In those circumstances, the limitations found within Article 9(2) are germane, understood through the lens of these core values. The first key element is to assess whether an action is a manifestation of religion or belief:

“82. Even where the belief in question attains the required level of cogency and importance, it cannot be said that every act which is in some way inspired, motivated or influenced by it constitutes a “manifestation” of the belief. Thus, for example, acts or omissions which do not directly express the belief concerned or which are only remotely connected to a precept of faith fall outside the protection of art.9(1). In order to count as a “manifestation” within the meaning of art.9, the act in question must be intimately linked to the religion or belief. An example would be an act of worship or devotion which forms part of the practice of a religion or belief in a generally recognised form. However, the manifestation of religion or belief is not limited to such acts; the existence of a sufficiently close and direct nexus between the act and the underlying belief must be determined on the facts of each case. In particular, there is no requirement on the applicant to establish that he or she acted in fulfilment of a duty mandated by the religion in question.” *Eweida and Others v United Kingdom* (2013) 57 E.H.R.R. 8.

12. The legitimate aim must then be identified: it is anticipated that most cases would be concerned with the rights and freedoms of others. Thereafter, consideration must be given to the question of whether restriction is “necessary in a democratic society”. It is in this regard that a proportionality assessment is required.

13. The proportionality assessment requires the court to:

“31. ....make a value judgment, an evaluation, by reference to the circumstances prevailing at the relevant time: *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816, paras 62–67. Proportionality must be judged objectively, by the court: *R (Williamson) v Secretary of State for Education and Employment* [2005] 2 AC 246,

para 51. ... it is in my view clear that the court must confront these questions, however difficult. ...

32. It is therefore necessary to consider the proportionality of the school's interference with the respondent's right to manifest her religious belief by wearing the jilbab to the school. In doing so we have the valuable guidance of the Grand Chamber of the *Strasbourg court in Sahin v Turkey (Application No 44774/98)*, paras 104–111.”  
*R (on the application of SB) v Denbigh High School Governors* [2007] 1 AC 100.

14. Consequently, an objective proportionality evaluation taking account of all the circumstances – through the lens of the core values addressed above – is required in the assessment of whether a restriction on the freedom to manifest a belief is necessary. We return to this at paragraph 32 below.

### ***Requirements of Article 10 ECHR***

15. Article 10 provides:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

16. A similar set of fundamental values can be identified as underlying Article 10:

“49. ... The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'. Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10 (2), it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no 'democratic society'. This means, amongst other things, that every 'formality', 'condition', 'restriction' or 'penalty' imposed in this sphere must be proportionate to the legitimate aim pursued.” *Handyside v United Kingdom* (1979-80) 1 E.H.R.R. 737, emphasis added.

17. Therefore, the right in Article 10(1) to freedom of expression is of fundamental importance. However, it is recognised that, via Article 10(2), the exercise of that right “carries with it duties and responsibilities. Amongst them – in the context of religious opinions and beliefs – may legitimately be included an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs...” (*Giniewski v France* (Application no 64016/00) at para 43).

18. The High Court in its recent consideration of the application of Article 10(2) emphasised that:

“This principle focusses on the quality or nature of the speech, whether it makes a meaningful contribution to public debate and/or whether it infringes the rights of others. ... It does, however, mean that any action which [the police] take to inhibit the speaker's freedom of expression must be "justified" under Articles 9.2 and 10.2 and proportionate. Moreover, these provisions must be applied having regard to the importance of the relevant rights, and the justification for any infringement must therefore be convincing...” (*Overd and others v The Chief Constable of Avon and Somerset Constabulary* [2021] EWHC 3100 at para 45).

19. When assessing whether an interference with the right to freedom of speech is permissible under Article 10(2), it must be “necessary”, that is there is a “pressing social need”, and “proportionate to the legitimate aim pursued” (*Vogt v Germany* (1996) 21 E.H.R.R 205 at para 52). There are clear similarities between the approach required in relation to Article 9 and that required in Article 10.

20. A key part of the proportionality assessment is identifying “whether any less intrusive measure could have been used without unacceptably compromising the achievement of the legitimate aim.” (*R (on the application of Miller) v College of Policing* [2021] EWCA Civ 1926 at para 104). The Court of Appeal, at para 107, went on to identify the need for any restrictions on freedom of speech to meet the four-part proportionality test in *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700 at para 20:

“(i) whether its objective is sufficiently important to justify the limitation of a fundamental right;

- (ii) whether it is rationally connected to the objective;
- (iii) whether a less intrusive measure could have been used; and
- (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.”

21. The four-stage *Bank Mellat* test was similarly applied in *R (on the application of Ngole) v University of Sheffield* [2019] EWCA Civ 1127 and *Overd and others v The Chief Constable of Avon and Somerset Constabulary*, above.

***The Framework Directive establishing a general framework for equal treatment in employment and occupation***

22. The provisions of the Framework Directive in relation to the concepts of discrimination are well-known to the Appeal Tribunal. Article 2 provides:

2. For the purposes of paragraph 1:

(a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on any of the grounds referred to in Article 1;

...

3. Harassment shall be deemed to be a form of discrimination within the meaning of paragraph 1, when unwanted conduct related to any of the grounds referred to in Article 1 takes place with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment. In this context, the concept of harassment may be defined in accordance with the national laws and practice of the Member States.

...

5. This Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

23. It is also worth noting and recalling the recitals to the Framework Directive, particularly Recitals 1 and 11:

(1) In accordance with Article 6 of the Treaty on European Union, the European Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member



States and it respects fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, as general principles of Community law. ...

(11) Discrimination based on religion or belief, disability, age or sexual orientation may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons (emphasis added).

24. The three most recent cases from the CJEU addressing manifestations of belief did so in different contexts, either indirect discrimination (Case C-157/15 *Achbita and Anr v G4S Solutions NV* EU:C:2017:203 and Case C-804-18 *Ix v WABE ev* EU:C:2021:594) or the applicability of a genuine occupational requirement (C-188/15 *Bougnaoui and Association de défense des droits de l'homme v Micropole SA* EU:C:2017:204). They were also concerned with rules of “neutrality”, which is not a feature of this case. Moreover, Article 10 rights were not engaged in these cases. Consequently, they are of very limited assistance in this matter. Nevertheless, it is notable that all three cases acknowledge the requirement that the Framework Directive must not interfere with Article 9 rights. As noted above, the recitals to the Framework Directive emphasise the fundamental values of liberty and democracy and economic and social cohesion.

### **Domestic legislation**

25. Section 13 of the Equality Act 2010 (“EqA 2010”) provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

26. Recent cases dealing with the manifestation of religion or belief indicate the significant difficulties that arise in these cases for workers and employers.

27. In *Chondol v Liverpool City Council* (UKEAT/0298/08/JOJ) the tribunal had found that the employer’s belief was that Mr Chondol had been inappropriately promoting Christianity to service users (para 19 EAT judgment). However, they had also found that this was not a reasonable belief. Despite this, they went on to reject his claim for discrimination because “it was not on the ground of his religion that he received this treatment, rather on the ground that he was improperly foisting it on service users.” This

was upheld by the EAT “That distinction between, on the one hand, the Appellant’s religious belief as such and, on the other, the inappropriate promotion of that belief is entirely valid in principle (though of course in any case in which such a distinction is relied on it will be necessary to be clear that it reflects the employer’s true reason)” (at para 23). The difficulty for workers in this context is that this was not a reasonable understanding of what he had in fact done, and there was no assessment of whether his dismissal in those circumstances breached his Article 9 rights.

28. Equally for employers, there is a difficulty in assessing where the line between appropriate and inappropriate conduct lies. The EAT in *Wastenev v East London NHS Foundation Trust* [2016] ICR 643 held that, the Appellant having accepted that the manifestation of religion or belief was not unrestricted:

“The concession is in some senses easier to state than apply, but the task will always be made easier by having a clear understanding of the nature of the claim and how it is being put. If the case is one of direct discrimination then the focus on *the reason why* the less favourable treatment occurred should permit an employment tribunal to identify those cases where the treatment is *not* because of the manifestation of the religion or belief but because of the inappropriate manner of the manifestation (where what is “inappropriate” may be tested by reference to article 9.2 and the case law in that respect” (at para 55).

The difficulty for employers is having clarity on what is required of them when making that distinction between appropriate and inappropriate manifestation of belief.

29. The most recent authority addressing the interaction between Article 9 and the EqA 2010, in the context of apparently inappropriate manifestation of religion or belief, is the Court of Appeal judgment in *Page v NHS Trust Development Authority* [2021] EWCA Civ 255. The key points arising from the judgment are:

- a. When a tribunal is considering a case of religion or belief discrimination there is no need for the tribunal to start by deciding “whether there has been a breach of the claimant’s relevant Convention rights, which can then inform its analysis of the claim under the [EqA 2010]. ... It is, ultimately, the [EqA 2010] from which the claimant’s rights must derive, and there can be nothing wrong in a tribunal taking that as the primary basis of its analysis.” (at para 37).

- b. Equally, “if there is reason to believe that a particular approach or outcome may involve a breach of the claimant's Convention rights that question must be fully considered.” (at para 37).
- c. Views that derive from a religion or belief are not necessarily sufficient as a causal link to constitute a manifestation of religion or belief, and thus an interference with Article 9 rights. The “closeness and directness of the relevant nexus was a matter for the assessment of the tribunal” (at para 48).
- d. No issue was raised before the Court of Appeal that the appropriate test for proportionality in Article 9 cases was the four-stage test in *Bank Mellat* (at para 52).
- e. Objection had justifiably been taken to the Claimant’s expression of his views from a “genuine and reasonable concern that [this] ... risked impairing the willingness of gay people with mental health difficulties to engage with its services” (at para 54).
- f. Case law has recognised a distinction between (1) where the reason is the fact that the claimant holds and/or manifests the protected religion or belief, and (2) where the reason is that the claimant had manifested that religion or belief in some particular way to which objection could justifiably be taken. In the latter case it is the objectionable manifestation of the religion or belief, and not the religion or belief itself, which is treated as the reason for the act complained of (see *Chondol v Liverpool City Council* (UKEAT/0298/08), *Grace v Places for Children* (UKEAT/0217/13/GE) and *Wastenev v East London NHS Foundation Trust* [2016] ICR 643) (at paras 68-69).
- g. If the consequences are not such as to justify the act complained of, they cannot sensibly be treated as separate from an objection to the religion or belief itself (at para 68).
- h. The Authority had taken disciplinary action against the appellant not because he was a Christian or because he held the traditional family beliefs but because he expressed the latter belief (and his other views about homosexuality) in the national media in circumstances which, on the tribunal's findings, justified the action taken (at para 72).
- i. The Court of Appeal acknowledged that the distinction applied by the tribunal had not been endorsed by the Court of Appeal but was “plainly correct”, deriving from the assessment of mental processes in *Nagarajan v London Regional Transport* [1999] ICR 877 (at para 74).

- j. The distinction also corresponded with the distinction in Article 9 between the absolute right to hold a religious or other belief and the qualified right to manifest it (para 74).

30. The AC submits that difficulties arise in relation to when “objection could justifiably be taken” to the manifestation of a religion or belief such that the reason why an employer acts is no longer because of the religion or belief but because of the manifestation of the religion or belief. It is difficult for employees to know in advance whether the expression of a religion or belief, or some other manifestation of religion or belief, may be permissibly sanctioned or not by employers, and to what extent they are free to express themselves as they wish. That in itself has a chilling effect because employees who are uncertain about expressing themselves are more likely to keep quiet. Similarly, employers lack clarity on when they can and cannot challenge expressions of religion or belief, or other manifestations of religion or belief, that they consider to be inappropriate and or harmful to their business. There is little clarity about to what extent (if at all) third-party views of the manifestation ought to be relevant – that is, views of colleagues, clients or service users. Greater legal clarity is required to ensure that proper recognition of Article 9 and 10 rights is achieved.

**Integrating domestic legislation and ECHR requirements in light of policy considerations – the suggested proportionality assessment**

31. The AC therefore submits that the starting point must be that the rights under Articles 9 and 10 are fundamental and foundational in a democratic society. Any restriction on those rights must be assessed strictly in accordance with both Articles 9(2) and 10(2).

32. In the application of Articles 9(2) and 10(2), a strict proportionality assessment is required. It is submitted that the appropriate strict proportionality test to be applied is the four-stage *Bank of Mellat* approach, set out above. The test must clearly cover the manifestation of all religions and beliefs protected by the EqA 2010. It cannot apply purely to the CoE or just Christianity.

33. The strict proportionality assessment must itself be undertaken with the need to encourage pluralism, tolerance and dialogue firmly in mind: to do otherwise would undermine the

rights in Articles 9(1) and 10(1). It is the AC's submission that a tribunal would be required to have the three core principles in mind when applying the *Bank of Mellat* test:

- a. Tolerance: the importance of avoiding social conflicts, engendering social cohesion and ensuring the protection of others' rights, that includes those who wish to manifest their religion or belief and those who do not.
- b. Pluralism: the importance of diversity and difference within society, seeking to accommodate difference, within a framework of tolerance and respect.
- c. Dialogue: the importance of free speech together with when it is legitimate to restrict free speech.

34. With these broad principles in mind, the practical factors that would be required to be assessed in the context of speech that falls within the ambit of Article 9 and Article 10 would include:

- a. Consideration of the content of the manifestation: recalling primarily that all speech is protected whether it is popular or not, while acknowledging that gratuitously offensive views may require to be restricted.
- b. Tone of the manifestation: calm and collected explanations are likely to weigh differently, compared to hectoring and aggressive speech.
- c. The worker's understanding of the audience's views: an awareness that they are speaking to those who are broadly in agreement, or do not have strong views, will impact on the appropriateness of the tone taken compared to where it is known that the audience holds strongly opposing views.
- d. The manner and nature of the manifestation: the extent and nature of any intrusion on others' rights, including whether it gives rise to a substantial impact on the employer's ability to run their business.
- e. The audience of the manifestation: whether it is a wide disparate audience on social media or a smaller group of people closely connected to the workplace.
- f. Whose views are said to be represented: where a worker has made it clear that the views are personal or whether they could fairly be said to appear to represent the views of the employer.
- g. The nature of the employee's role: any power imbalance between the worker and a person whose rights are intruded upon.

- h. The nature of the employer's business: consideration may be given, in rare situations, to whether the clients or service users of the business are particularly vulnerable such that protection from certain manifestation of beliefs is necessary.
- i. Whether there were less intrusive measures available to the employer: a detailed analysis of what the options available to the employer were and whether the limitation of the manifestation of religion or belief could be avoided or reduced by taking other steps.

35. When assessing proportionality, the rights of all parties must be considered. This includes the worker and the employer but also the rights of third parties whose rights are affected. The balance to be struck, it is submitted, is that a third party's view is relevant where it is legitimate, that is, where that third party's rights are affected by the exercise of the right. As noted above, the extent and nature of the intrusion on the other person's rights are relevant factors within the proportionality assessment, but they should not be determinative. They are a factor to be considered within the broad assessment of proportionality.

**SARAH FRASER BUTLIN**

**Cloisters**

**31<sup>st</sup> January 2022**